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In the Supreme Court of the United States

OCTOBER TERM, 1979

MOUNTAINEER EXCAVATING COMPANY, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that petitioner violated the National Labor Relations Act by offering its employees substantial economic benefits designed to induce them to abandon the Union and by unilaterally changing terms and conditions of employment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 59–66) is not reported. The Board's decision and order (Pet. App. 23–58) are reported at 241 N.L.R.B. No. 80.

JURISDICTION

The judgment of the court of appeals (Pet. App. 67–68) was entered on March 12, 1980. The petition for a writ of certiorari was filed on June 6, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at Pet. 4–5.

STATEMENT

1. Petitioner, which is engaged in the surface mining of coal, began operations in July 1977. On July 6, 1977, petitioner and the Union[1] entered into a collective bargaining agreement whereby petitioner recognized the Union and agreed to be bound by the terms of the National Bituminous Coal Agreement in effect between December 6, 1974 and December 6, 1977.[2] In

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[1] United Mine Workers of America, District 28.

[2] Petitioner is not a member of the Bituminous Coal Operators Association ("BCOA") (Pet. App. 28).

late July 1977, the International Union, acting on behalf of the Local, notified petitioner that the Union intended to terminate the agreement when it expired and that it was prepared to negotiate a new agreement. In late September, petitioner responded with a letter expressing a similar intention. There was no further communication between petitioner and the Union until December 1 (Pet. App. 27–28). On that date, Tom Cooper, petitioner's president, sent a second letter to the Union. Cooper stated that it appeared that BCOA and the Union would be unable to reach agreement on a new contract and that there would be a strike when the current contract expired. He reminded the Union that petitioner was not a member of BCOA and that it was not obligated to sign any agreement entered into with BCOA. Cooper added that petitioner was willing to negotiate with the Union for a new agreement between it and the Union. Cooper also stated that, if Union health insurance benefits were lost during the anticipated strike, petitioner intended to provide a new life and health insurance policy for its employees, and that petitioner also wished to "negotiate a better pension plan for [the employees]" (Pet. App. 29–30).

On the evening of December 1, petitioner held a dinner meeting with its employees at which Cooper gave a speech. He discussed the possibility of a strike the following week and detailed the economic consequences that might occur in the event of such a strike.

Cooper warned the employees that if there were a strike their current hospital card might not be good, the Union's health and welfare fund might not pay any benefits, medical benefits would be cut off immediately, and pension payments could be cut off as of the first week in January. Cooper then assured the employees that they could avoid the loss of any benefits. He told them that petitioner intended to operate during the strike and to continue paying the employees' insurance premiums for those who worked during the strike (Pet. App. 30–33). He added that petitioner's proposed health insurance would "cover all of our men who continue working," and would cost the employees "[a]bsolutely nothing" (*id.* at 32–33). Petitioner's business manager then discussed the details of the proposed health and pension plans referred to in Cooper's speech (*id.* at 30–31).[3]

The Union called a strike for December 6, the day the BCOA contract was due to expire. On December 5, Cooper again met with the employees, and, without disavowing petitioner's intention to provide its own health care and insurance plan, asked for a show of hands as to who would not work the following day. No employee raised his hand. Petitioner then informed the employees that their jobs would be available.[4] The

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[3] Petitioner had executed a new pension plan on November 1, 1977, without the Union's knowledge (Pet. App. 42).

[4] During this meeting, one of the employees handed Cooper a petition signed by 10 of petitioner's 13 employees, stating that they wished to withdraw from the Union (Pet. App. 33).

following day, petitioner put into effect its new hospital and pension plans. Approximately two weeks later, petitioner granted the employees a week's vacation without consulting the Union (Pet. App. 33–34).

2. The Union filed a charge with the Board and a complaint issued (Pet. App. 23). The parties waived their right to a hearing before an administrative law judge and submitted the case directly to the Board for findings of fact and conclusions of law based on a stipulated record, including various exhibits (Pet. App. 24–25). After reviewing the entire record in the proceeding, the Board found that petitioner, "by unilaterally offering its employees on December 1 and 5, 1977, substantial economic benefits designed to induce them to abandon their Union and bargain directly with [petitioner], * * * interfered with its employees' Section 7 rights in violation of Section 8(a)(1) of the Act." The Board further found that petitioner violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), by unilaterally implementing the hospitalization and pension programs and by unilaterally changing the employees' vacation schedule, without having first timely notified and offered to bargain with the Union (Pet. App. 47–48).

The Board explained that (Pet. App. 42–43):

> If [petitioner] had been desirous of (1) entering into negotiations with the [Union], it needed only to direct timely communications to the Union specifically requesting negotiating sessions or (2) making particular proposals to the Union, its obligation was to submit these proposals timely to the Union. It did neither. Rather, [petitioner] played a "waiting game" until the bargaining at the na-

> tional level reached a crisis stage, and then sent the December 1 letter to the Union requesting negotiations and, on that very same evening, met with the employees, predicted dire economic circumstances, and offered them substantial economic benefits* * *.

The Board further found (Pet. App. 43–45):

> [Petitioner] obviously timed that December 1 letter so as to preclude any possibility of the Union consulting with the employees, or any real or meaningful consideration by the Union of [petitioner's] stated intent to institute certain benefits as of December 6. In addition, notwithstanding the fact that [petitioner] contracted for the pension plan a month earlier, it concealed this fact by stating in the letter that it wanted "to negotiate a better pension plan for our men." On December 5, [petitioner] again unilaterally offered its employees substantial economic benefits when it inquired of the employees as to whether any of them were going to strike the next day and advised them, without disavowing its intentions as expressed at the December 1 meeting of putting into effect different terms and conditions of employment, that their jobs would be available. Having precluded any meaningful response by the Union by virtue of the timing of its actions, [petitioner] then took the final step on December 6 by unilaterally putting into effect both the hospitalization plan and the pension plan.

3. In a *per curiam* opinion, the court of appeals upheld the Board's decision and enforced its order, concluding that there was "substantial evidence to support the Board's findings that [petitioner] engaged in the charged unfair labor practices" (Pet. App. 65).

ARGUMENT

Petitioner does not challenge the well-settled principle that an employer violates Section 8(a)(1) of the Act by ignoring the union as the employees' exclusive bargaining representative, by negotiating directly with its employees at a time when negotiations with the union are pending, and by inducing its employees to abandon their union by offering them substantial economic benefits. *Medo Photo Supply Corp.* v. *NLRB*, 321 U.S. 678, 684–686 (1944). Nor does it challenge the principle that an employer violates Section 8(a)(5) of the Act by unilaterally implementing changes in terms and conditions of employment. *NLRB* v. *Katz*, 369 U.S. 736, 742–743 (1962); *Medo Photo Supply Corp.* v. *NLRB*, *supra*, 321 U.S. at 685–687. Rather, petitioner claims only that the Board's findings, which were upheld by the court of appeals, are not supported by substantial evidence. Particularly in the absence of any conflict among the courts of appeals, this factual issue does not warrant further review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951).

In any event, the record described in detail above amply supports the Board's findings. Petitioner never made good faith proposals to the Union. Rather, it waited until the eleventh hour before the strike to request negotiations and then met with its employees that same evening to predict dire economic consequences from a strike and to offer substantial economic benefits (Pet. App. 42–43). Similarly, petitioner told the Union that it wanted "to negotiate a better pension plan for our men," when in fact it had previously con-

tracted for a new pension plan without consulting the Union (*id.* at 44). Finally, on December 5, 1977, petitioner again unilaterally offered its employees substantial economic benefits and on the following day, when the industry-wide contract expired, petitioner unilaterally put its new hospitalization and pension plans into effect—actions timed to preclude any meaningful response from the Union (*id.* at 44–46).

Petitioner nonetheless contends (Pet. 17–19) that the Board's decision is arbitrary and capricious because its conclusions in this case are "directly contrary to its findings in other cases * * * in which an employer engaged in substantially similar conduct."[5] The cases on which petitioner relies are, however, readily distinguished. For example, in *Manitowoc Co.*, 186 N.L.R.B. 994, 1005–1006 (1970), the Board found that the employer, who repeatedly told its employees that it would continue to meet and negotiate with the Union on a mutually acceptable basis, did not attempt to bypass the union or undermine its status as the exclusive bargaining representative. In contrast, here

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[5] Although petitioner correctly states (Pet. 18–19) that the Board did not distinguish the cases cited by petitioner, petitioner did not refer to these cases in its brief to the Board.

Likewise, there is no merit to petitioner's contention (Pet. 20–22) that the court of appeals violated the Administrative Procedure Act, 5 U.S.C. 706(2)(A), by failing to address explicitly its claim regarding the Board's asserted failure to distinguish its prior cases. A court is not required to comment on every issue raised by a party. To the contrary, Rule 36 of the Federal Rules of Appellate Procedure contemplates that a court of appeals may render a decision without an opinion. See also *NLRB* v. *Amalgamated Clothing Workers*, 430 F.2d 966 (5th Cir. 1970).

the Board found (Pet. App. 42) that petitioner purposefully bypassed the Union in order to negotiate directly with its employees and thereby undermine the Union. Similarly, in *Valley Feed and Supply Co.*, 135 N.L.R.B. 778, 788, 791 (1962), and in *Marco Polo Resort Motel*, 242 N.L.R.B. No. 186 (Mar. 9, 1979), the Board found that the employers' limited communications with the employees were carried out in a noncoercive manner. Here, however, the Board found that petitioner not only spoke to its employees directly at length about the terms and conditions of their employment, but also offered them substantial economic benefits designed to induce them to abandon the Union and to bargain directly with petitioner. Finally, in *Forster Manufacturing Co.*, 175 N.L.R.B. 185 (1969), the Board found it unnecessary even to reach the issue of whether an employer's communication to an employee violated Section 8(a)(1) of the Act because the administrative law judge found that the employer's supervisor had not made the alleged unlawful remark (175 N.L.R.B. at 185 n.2).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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